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SENATE BILL 1

43RD LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 1997

INTRODUCED BY

Timothy Z. Jennings

FOR THE REVENUE STABILIZATION AND TAX POLICY COMMITTEE

AN ACT

RELATING TO PROCUREMENT; PROVIDING FOR EQUAL TREATMENT OF NEW MEXICO BUSINESSES WITH NEW YORK BUSINESSES IN PROCUREMENT MATTERS; AMENDING AND ENACTING SECTIONS OF THE NMSA 1978; DECLARING AN EMERGENCY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. [NEW MATERIAL] EQUAL PROCUREMENT ACCESS FOR NEW YORK BUSINESSES. --

A. Certain recent amendments to the New York state procurement statutes have the effect of prohibiting New Mexico businesses from selling goods or providing services to New York state and local governments and quasi-governmental entities.

This act eliminates all differential treatment of any kind between New York state business enterprises and New Mexico businesses in New Mexico procurement and thereby negates the

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1 application to New Mexico businesses of the New York amendments
2 and protects the access of New Mexico businesses to the New York
3 market.

4 B. New York state business enterprises shall be
5 treated as New Mexico resident businesses or resident
6 manufactures for all procurement purposes.

7 Section 2. Section 13-1-21 NMSA 1978 (being Laws 1979,
8 Chapter 72, Section 1, as amended) is amended to read:

9 "13-1-21. APPLICATION OF PREFERENCES. --

10 A. For the purposes of this section:

11 (1) "resident business" means a New Mexico
12 resident business or a New York state business enterprise;

13 (2) "New Mexico resident business" means a
14 business that is authorized to do and is doing business under
15 the laws of this state and:

16 (a) that maintains its principal place of
17 business in the state;

18 (b) has staffed an office and has paid
19 applicable state taxes for two years prior to the awarding of
20 the bid and has five or more employees who are residents of the
21 state; or

22 (c) is an affiliate of a business that
23 meets the requirements of Subparagraph (a) or (b) of this
24 paragraph. As used in this section, "affiliate" means an entity
25 that directly or indirectly through one or more intermediaries

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1 controls, is controlled by or is under common control with the
2 qualifying business through ownership of voting securities
3 representing a majority of the total voting power of the entity;

4 (3) "New York state business enterprise" means
5 a business enterprise, including a sole proprietorship,
6 partnership or corporation, that offers for sale or lease or
7 other form of exchange, goods or commodities that are
8 substantially manufactured, produced or assembled in New York
9 state, or services, other than construction services, that are
10 substantially performed within New York state. For purposes of
11 construction services, a New York state business enterprise
12 means a business enterprise, including a sole proprietorship,
13 partnership or corporation, that has its principal place of
14 business in New York state;

15 [~~(2)~~] (4) "resident manufacturer" means a
16 person who offers materials grown, produced, processed or
17 manufactured wholly in the state; provided, however, that a New
18 York state business enterprise shall be deemed to be a resident
19 manufacturer solely for the purpose of evaluating the New York
20 state business enterprise's bid against the bid of a resident
21 manufacturer that is now a New York state business enterprise;

22 [~~(3)~~] (5) "recycled content goods" means
23 supplies and materials composed in whole or in part of recycled
24 materials; provided that the recycled materials content meets or
25 exceeds the minimum content standards required by bid

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1 specifications; and

2 [~~(4)~~] (6) "virgin content goods" means supplies
3 and materials that are wholly composed of nonrecycled materials
4 or do not meet minimum recycled content standards required by
5 bid specification.

6 B. When bids are received only from nonresident
7 businesses and resident businesses and the lowest responsible
8 bid is from a nonresident business, the contract shall be
9 awarded to the resident business whose bid is nearest to the bid
10 price of the otherwise low nonresident business bidder if the
11 bid price of the resident bidder is made lower than the bid
12 price of the nonresident business when multiplied by a factor of
13 .95.

14 C. When bids are received only from nonresident
15 businesses and resident manufacturers and the lowest responsible
16 bid is from a nonresident business, the contract shall be
17 awarded to the resident manufacturer whose bid is nearest to the
18 bid price of the otherwise low nonresident business bidder if
19 the bid price of the resident manufacturer is made lower than
20 the bid price of the nonresident business when multiplied by a
21 factor of .95.

22 D. When bids are received only from resident
23 businesses and resident manufacturers and the lowest responsible
24 bid is from a resident business, the contract shall be awarded
25 to the resident manufacturer whose bid is nearest to the bid

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1 price of the otherwise low resident business bidder if the bid
2 price of the resident manufacturer is made lower than the bid
3 price of the resident business when multiplied by a factor of
4 .95.

5 E. When bids are received from resident
6 manufacturers, resident businesses and nonresident businesses
7 and the lowest responsible bid is from a resident business, the
8 contract shall be awarded to the resident manufacturer whose bid
9 is nearest to the bid price of the otherwise low resident
10 business bidder if the bid price of the resident manufacturer is
11 made lower than the bid price of the resident business when
12 multiplied by a factor of .95.

13 F. When bids are received from resident
14 manufacturers, resident businesses and nonresident businesses
15 and the lowest responsible bid is from a nonresident business,
16 the contract shall be awarded to the resident manufacturer whose
17 bid is nearest to the bid price of the otherwise low nonresident
18 business bidder if the bid price of the resident manufacturer is
19 evaluated as lower than the bid price of the nonresident
20 business when multiplied by a factor of .95. If there is no
21 resident manufacturer eligible for award under this provision,
22 then the contract shall be awarded to the resident business
23 whose bid is nearest to the bid price of the otherwise low
24 nonresident business bidder if the bid price of the resident
25 business is made lower than the bid price of the nonresident

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1 business when multiplied by a factor of .95.

2 G. When bids are received for virgin content goods
3 only or for recycled content goods only, Subsections B through F
4 of this section shall apply.

5 H. When bids are received for both recycled content
6 goods and virgin content goods and the lowest responsible bid is
7 for virgin content goods, the contract shall be awarded to:

8 (1) a resident manufacturer offering the lowest
9 bid on recycled content goods of equal quality if the bid price
10 of the resident manufacturer when multiplied by a factor of .90
11 is made lower than the otherwise low virgin content goods bid
12 price;

13 (2) a resident business offering a bid on
14 recycled content goods of equal quality if:

15 (a) the bid price of no resident
16 manufacturer following application of the preference allowed in
17 Paragraph (1) of this subsection can be made sufficiently low;
18 and

19 (b) the lowest bid price of the resident
20 business when multiplied by a factor of .90 is made lower than
21 the otherwise low virgin content goods bid price; or

22 (3) a nonresident business or nonresident
23 manufacturer offering recycled content goods of equal quality
24 if:

25 (a) the bid price of no resident business

1 or resident manufacturer following application of the preference
2 allowed in Paragraph (1) or (2) of this subsection can be made
3 sufficiently low; and

4 (b) the lowest bid price of a nonresident
5 offering recycled content goods when multiplied by a factor of
6 .95 is made lower than the otherwise low virgin content bid
7 price.

8 I. When bids are received for both recycled content
9 goods and virgin content goods, and the lowest responsible bid
10 is for recycled content goods offered by a nonresident business
11 or nonresident manufacturer, the contract shall be awarded to:

12 (1) a resident manufacturer offering the lowest
13 bid on recycled content goods of equal quality if the bid price
14 of the resident manufacturer when multiplied by a factor of .95
15 is made lower than the otherwise low recycled content goods bid
16 price; or

17 (2) a resident business offering a bid on
18 recycled content goods of equal quality if:

19 (a) the bid price of no resident
20 manufacturer following application of the preference allowed in
21 Paragraph (1) of this subsection can be made sufficiently low;
22 and

23 (b) the lowest bid price of the resident
24 business when multiplied by a factor of .95 is made lower than
25 the otherwise low recycled content goods bid price offered by a

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1 nonresident business or manufacturer.

2 J. When bids are received for both recycled content
3 goods and virgin content goods, and the lowest responsible bid
4 is for recycled content goods offered by a resident business,
5 the contract shall be awarded to a resident manufacturer
6 offering the lowest bid on recycled content goods of equal
7 quality if the bid price of the resident manufacturer when
8 multiplied by a factor of .95 is made lower than the otherwise
9 low recycled content goods bid price.

10 K. This section shall not apply when the expenditure
11 of federal funds designated for a specific purchase is involved
12 or for any bid price greater than five million dollars
13 (\$5,000,000). "

14 Section 3. Section 13-4-2 NMSA 1978 (being Laws 1984,
15 Chapter 66, Section 2, as amended) is amended to read:

16 "13-4-2. RESIDENT CONTRACTOR DEFINED--APPLICATION OF
17 PREFERENCE. --

18 A. [A] "Resident contractor" [~~is~~] means a New Mexico
19 resident contractor or a New York state business enterprise

20 B. "New Mexico resident contractor" means any
21 person, firm, corporation or other legal entity if, at the time
22 the contract is advertised for bids and at the time bids are
23 opened, it has all required licenses and meets the following
24 requirements:

25 (1) if the bidder is a corporation, it shall be

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1 incorporated in New Mexico and maintain its principal office and
2 place of business in New Mexico, and a majority of its
3 outstanding shares shall be beneficially owned by one or more
4 individual citizens who are domiciled in the state;

5 (2) if the bidder is a partnership, general or
6 limited, or other legal entity, it shall maintain its principal
7 office and place of business in New Mexico, and the partners or
8 associates owning a majority beneficial interest shall be
9 domiciled in the state. If one or more partners or associates
10 are corporations, a majority of the outstanding shares of each
11 corporation shall be beneficially owned by individual citizens
12 who are domiciled in the state. If the entity is a trust, a
13 majority of the beneficial interest of the trust shall be owned
14 by individual citizens who are domiciled in the state;

15 (3) if the bidder is an individual, he shall
16 maintain his principal office and place of business in New
17 Mexico, and the individual shall be a citizen of and domiciled
18 in the state; or

19 (4) if a bidder who is a telecommunications
20 company as defined by Subsection M of Section 63-9A-3 NMSA 1978
21 or an affiliate of a telecommunications company has paid
22 unemployment compensation to the employment security division of
23 the labor department at the applicable experience rate for that
24 employer pursuant to the [New Mexico] Unemployment Compensation
25 Law on no fewer than ten employees who have performed services

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1 subject to contributions for the two-year period prior to
2 issuance of notice to bid, the bidder will be considered to have
3 fulfilled the requirements of Paragraph (1), (2) or (3) of this
4 subsection. A successor to a previously qualified New Mexico
5 contractor or resident contractor, where the creation of the
6 bidder resulted from a court order, is entitled to credit for
7 qualifying contributions paid by the previously qualified New
8 Mexico contractor or resident contractor.

9 C. "New York state business enterprise" means a
10 business enterprise, including a sole proprietorship,
11 partnership or corporation, that offers for sale or lease or
12 other form of exchange, goods or commodities that are
13 substantially manufactured, produced or assembled in New York
14 state, or services, other than construction services, that are
15 substantially performed within New York state. For purposes of
16 construction services, a New York state business enterprise
17 means a business enterprise, including a sole proprietorship,
18 partnership or corporation, that has its principal place of
19 business in New York state;

20 [~~B.~~] D. For purposes of this section:

21 (1) "affiliate" means an entity that directly
22 or indirectly through one or more intermediaries controls, is
23 controlled by or is under common control with a
24 telecommunications company through ownership of voting
25 securities representing a majority of the total voting power of

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1 that entity; and

2 (2) "beneficially owned" or "beneficial
3 interest" means exercising actual management and control of all
4 operations, including but not limited to financial decisions,
5 financial liability, labor relations, supervision of field
6 operations, purchases of goods, supplies and services, marketing
7 and sales.

8 [~~C-~~] E. When bids are received only from nonresident
9 contractors and resident contractors and the lowest responsible
10 bid is from a nonresident contractor, the contract shall be
11 awarded to the resident contractor whose bid is nearest to the
12 bid price of the otherwise low nonresident contractor if the bid
13 price of the resident contractor is made lower than the bid
14 price of the nonresident contractor when multiplied by a factor
15 of .95.

16 [~~D-~~] F. No contractor shall be treated as a resident
17 contractor in the awarding of public works contracts by a state
18 agency or a local public body unless the contractor has
19 qualified with the state purchasing agent as a resident
20 contractor pursuant to this section by making application to the
21 state purchasing agent and receiving from him a certification
22 number. The procedure for application and certification is as
23 follows:

24 (1) the state purchasing agent shall prepare an
25 application form for certification as a resident contractor,

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1 requiring such information and proof as he deems necessary to
2 qualify the applicant under the terms of this section;

3 (2) the contractor seeking to qualify as a
4 resident contractor shall complete the application form and
5 submit it to the state purchasing agent prior to the submission
6 of a bid on which the contractor desires to be given a
7 preference;

8 (3) the state purchasing agent shall examine the
9 application and if necessary may seek additional information or
10 proof so as to be assured that the prospective contractor is
11 indeed entitled to certification as a resident contractor. If
12 the application is in proper form, the state purchasing agent
13 shall issue the contractor a distinctive certification number
14 which is valid until revoked and which, when used on bids and
15 other purchasing documents for state agencies or local public
16 bodies, entitles the contractor to treatment as a resident
17 contractor under Subsection [C] E of this section; and

18 (4) the certification number issued pursuant to
19 Paragraph (3) of this subsection shall be revoked by the state
20 purchasing agent upon making a determination that the contractor
21 no longer meets the requirements of a resident contractor as
22 defined in this section. "

23 Section 4. Section 13-4-5 NMSA 1978 (being Laws 1933,
24 Chapter 19, Section 1, as amended) is amended to read:

25 "13-4-5. USE OF NEW MEXICO MATERIALS. --

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1 A. In all public works within New Mexico, whether
2 constructed or maintained by the state or by a department, a
3 board, a commission of the state or by any political subdivision
4 thereof, or in any construction or maintenance to which the
5 state or any political subdivision thereof has granted aid,
6 preference shall be given to materials produced, grown,
7 processed or manufactured in New Mexico by citizens or residents
8 ~~[thereof]~~ of New Mexico or provided or offered by a New York
9 state business enterprise, and such materials shall be used
10 where ~~[the same]~~ they are deemed satisfactory for the intended
11 use. In any case where, in the judgment of the different
12 officers, boards, commissions or other authority in this state
13 now or hereafter vested with the power of contracting for
14 material used in the construction or maintenance of public works
15 ~~[herein above]~~ referred to in this section, it appears that an
16 attempt is being made by producers, growers, processors or
17 manufacturers in the state to form a trust or combination of any
18 kind for the purpose of fixing or regulating the price of
19 materials to be used in any public works to the detriment of or
20 loss to the state, then the provisions of this section shall not
21 apply.

22 B. As used in this section, "New York state business
23 enterprise" means a business enterprise, including a sole
24 proprietorship, partnership or corporation, that offers for sale
25 or lease or other form of exchange, goods or commodities that

1 are substantially manufactured, produced or assembled in New
2 York state, or services, other than construction services, that
3 are substantially performed within New York state. For purposes
4 of construction services, a New York state business enterprise
5 means a business enterprise, including a sole proprietorship,
6 partnership or corporation, that has its principal place of
7 business in New York state."

8 Section 5. EMERGENCY.--It is necessary for the public
9 peace, health and safety that this act take effect immediately.

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1 FORTY- FIRST LEGISLATURE
2 FIRST SESSION, 1997

SB 1/a

3
4
5 January 22, 1997

6
7 Mr. President:

8
9 Your PUBLIC AFFAIRS COMMITTEE, to whom has been
10 referred

11
12 SENATE BILL 1

13
14 has had it under consideration and reports same with
15 recommendation that it DO PASS, amended as follows:

16
17 1. On page 14, between lines 7 and 8, insert the following
18 new section:

19
20 "Section 5. SEVERABILITY. --If any part or application of this
21 act is held invalid, the remainder or its application to other
22 situations or persons shall not be affected."

23
24 2. Renumber the succeeding section accordingly.

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Respectfully submitted,

**FORTY-SECOND LEGISLATURE
SECOND SESSION, 1996**

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Shannon Robinson, Chairman

Adopted _____ Not Adopted _____
(Chief Clerk) (Chief Clerk)

Date _____

The roll call vote was 9 For 0 Against

Yes: 9

No: 0

Excused: 0

Absent: 0

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State of New Mexico House of Representatives

FORTY-THIRD LEGISLATURE
FIRST SESSION, 1997

January 23, 1997

Mr. Speaker:

Your BUSINESS AND INDUSTRY COMMITTEE, to whom has
been referred

SENATE BILL 1, as amended

has had it under consideration and reports same with
recommendation that it DO PASS.

Respectfully submitted,

Fred Luna, Chairman

FORTY-THIRD LEGISLATURE
FIRST SESSION, 1997

SB 1

Page 18

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2 Adopted _____ Not Adopted _____

3 (Chief Clerk)

(Chief Clerk)

4

Date _____

5

6 The roll call vote was 10 For 0 Against

7 Yes: 10

8 Excused: Kissner, Rodella

9 Absent: Corley

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